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90-1655

Supreme Court, U.S.
FILED
APR 29 1991
OFFICE OF THE CLERK

No.

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1990

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**NIGEL GORDON,**

Petitioner,

vs.

**PEOPLE OF THE STATE OF ILLINOIS,**

Respondent.

---

**PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF ILLINOIS, FIRST JUDICIAL DISTRICT**

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FREDERICK F. COHN
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Attorney for Petitioner

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## (1a) QUESTIONS PRESENTED

1. Whether due process is denied where defendant is convicted of possession of controlled substance under a constructive possession theory, where the sole evidence against defendant is his being a co-lessee with another in a two bedroom apartment, and where the contraband was found hidden in the insulation of a refrigerator, and defendant was not present when the contraband was found, and there is no evidence of when he was last in the apartment?

2. Whether due process was denied when the Appellate Court created evidence that did not exist, and then relies on that evidence?

**(1b) PARTIES INVOLVED [per Rule 21.1(b)]**

Petitioner, Nigel Gordon, was the defendant in the Circuit Court of Cook County, Illinois, appellant in the Appellate Court of Illinois, and petitioner in Petition for Leave to Appeal filed in the Supreme Court of Illinois. Respondent, People of the State of Illinois, was plaintiff in the Circuit Court of Cook County, Illinois, appellee in the Appellate Court of Illinois, and respondent in the Supreme Court of Illinois.

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## (1d) Opinion Below

The Illinois Appellate Court's Order affirming this cause is People v. Gordon, and is not published and is attached as Appendix A to this Petition.

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NIGEL GORDON,

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF ILLINOIS, FIRST JUDICIAL DISTRICT

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Petitioner, Nigel Gordon (hereafter, defendant), prays that a writ of certiorari issue to review the Illinois Appellate Court for the First District, affirming his conviction and sentence for possession of a controlled substance, in

violation of Ill. Rev. Stat. 1985, Chap. 56 1/2, Sec. 1402(B), leave to appeal having been denied by the Illinois Supreme Court.

**Judgment, Opinion and Order Below**

The Order of the Appellate Court of Illinois, First Judicial District, affirming the trial court judgment, is set out as Appendix A. The Order of the Appellate Court of Illinois, First Judicial District, denying Petition for Rehearing, is set out as Appendix B. The Order of the Illinois Supreme Court denying Petition for Leave to Appeal, is set out as Appendix C.

## Jurisdictional Statement

On October 16, 1990, the Illinois Appellate Court, First Judicial District, filed its Order affirming the judgment of the Circuit Court of Cook County, Illinois. (App. A) A Petition for Rehearing, timely filed, was denied on November 8, 1990. (App. B) Defendant's Petition for Leave to Appeal, timely filed, was denied by the Illinois Supreme Court on February 6, 1991. (App. C) This Petition is timely filed within 60 days thereafter. Jurisdiction is invoked under 28 U.S.C. 1257(3) and Rules 20.1 and 29 of this Court.

## Constitutional Provision

AMENDMENT [XIV]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall ... deprive any person of ... liberty, without due process of law....

## STATEMENT OF THE CASE

On December 8, 1987 at 8:45 p.m., John Howard, Evanston Police Officer, entered a residence at 7621 N. Greenview. He was executing a search warrant. He entered the apartment and found co-lessee, Baldwin Phillips, and his girlfriend. Cocaine was found hidden within the insulation of the refrigerator. Officer Howard testified:

> "During the search of the apartment found underneath the ice box hidden in some insulation there was a clear plastic baggie, inside this baggie there were 8 balls of tin foil, inside each one of these tin foil balls there was packets that contained a white powder; as much as 7 packets as I recall there was 1 in each of these tin foil packets, and as little as 3 or 4 in some of the others. There was a total of 38 individually wrapped clear packets." (Tr. 61)

It was stipulated that the items found hidden were 8.8 grams of cocaine.

Found on the counter top was a box of baggies, several cut corners of these baggies and a portable hand scale. (Tr. 64) On the counter top in the kitchen (Tr. 63), he found a prescription bottle for penicillin pills prescribed to Nigel Gordon four years earlier, August 24, 1983. There was no testimony as to the proximity of the prescription bottle to the drug paraphernalia. (Tr. 63)

Further evidence was presented that Nigel Gordon had signed the lease with Baldwin Phillips for the apartment six months earlier in June of 1987. (Tr. 106)

There was no evidence as to when Nigel Gordon had last been in the apartment. There was no evidence that Nigel Gordon had any dealings with narcotics.

The court, based solely upon Nigel Gordon's position as co-lessee, found the defendant guilty of possession and sentenced the defendant to four years.

## RAISING THE FEDERAL QUESTION

In the trial court, the State Appellate Court and the Petition for Leave to Appeal to the State Supreme Court, it was asserted that to find defendant guilty based solely upon his position as a co-lessee of the premises denies due process. The Illinois Appellate Court held due process was not violated. (App. A, pp. 6-25) Raised in the State Supreme Court (Petition for Leave to Appeal) in addition to the argument that to convict defendant based on mere co-occupancy violated due process, was that due process was denied when the Appellate Court created evidence that did not exist. The Petition for Leave to Appeal was denied without opinion.

## REASONS FOR GRANTING CERTIORARI

1.

**Due process is denied where defendant is convicted of possession of controlled substance under a constructive possession theory, where the sole evidence against defendant is his being a co-lessee with another in a two bedroom apartment, and where the contraband was found hidden in the insulation of a refrigerator, and defendant was not present when the contraband was found, and there is no evidence of when he was last in the apartment.**

This Court should grant a petition for writ of certiorari because the issue is of national importance. In present society, many persons who are unrelated, for financial convenience, share apartments. One may possess contraband. At issue is whether, with no proof other than joint occupancy, can a co-tenant, who is not present when police find the contraband, be convicted of such possession without violating due process.

The undisputed facts are that at 8:45 p.m. on December 8, 1987, Evanston Police Officers executed a search warrant on a second floor apartment to which the defendant and Baldwin Phillips were co-lessees. They had separate bedrooms. Only co-lessee, Baldwin Phillips, and his girlfriend were in the apartment. Defendant was not present. (App. A, pp. 2, 5)[1]

> "A search of the kitchen revealed a clear plastic bag hidden in some of the insulation underneath the refrigerator." (App. A, pp. 2-3)

In the bag was 8.8 grams of cocaine. (Tr. 86)[2] Found on a kitchen counter

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1. Co-defendant was charged, as was defendant. A severance was granted.

2. The Appellate Court misstated the facts, asserting there was 8.8 ounces of cocaine. This was a substantial error. The stipulation was that there was 8.8 grams which is about one-third of an ounce. (Tr. 63)

were bags similar to those found with the cocaine. (Tr. 63) Also found on a kitchen counter was a prescription bottle that had the defendant's name on it dated four and one-half years earlier--August 24, 1983. (Tr. 64) There was no testimony as to the size of the counter, or how close the bottle was to the other items. (Tr. 63)[3] There was no testimony whether that prescription bottle had anything in it. Defendant was not present in the apartment when the contraband was found, and there is no

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3. The Appellate Court misstated that fact by stating:

> "On a counter next to the refrigerator, the police found a roll of plastic bags.... Resting on top of the bags were a prescription bottle, a bottle of Superior Mannitol and a portable hand scale. (App. A, pp. 3-4)

evidence when he was last in the apartment, i.e., no evidence that he was in the apartment when the "drug paraphernalia" was visible. There is no evidence that defendant had prior dealings with narcotics. There is no action of defendant that demonstrates guilty knowledge. There is no evidence of furtive action when the police arrived. There is no evidence of flight.

Hence, the sole evidence of defendant's guilt was his position as co-lessee.

The Appellate Court held that defendant, being a co-lessee, by itself, justifies a finding that defendant had knowing constructive control of the contraband hidden in the kitchen. (App. A, p. 10) The Appellate Court stated:

> "Where a controlled substance is found on premises under the

> control of a defendant, an inference of knowledge and possession arises which may be sufficient to sustain a conviction of possession absent other facts and circumstances which leave a reasonable doubt of defendant's guilt. (People v. Nettles (1961), 23 Ill. 2d 306, 178 N.E.2d 361.)" (App. A, p. 10)

The Opinion of the Appellate Court violates due process, because there is no basis for a rational trier of fact to find beyond reasonable doubt that defendant's mere co-occupancy proves that defendant with knowledge had constructive possession. Finding constructive possession by mere co-occupancy is equivalent to finding "guilt by association ... a thoroughly discredited doctrine." Uphaus v. Wyman, 360 U.S. 72, at 79, 3 L.Ed.2d 1090 (1957).

Although some State courts permit constructive possession convictions based

on mere co-occupancy, the opinion of the Illinois Appellate Court is contrary to the prevalent holding of both State and Federal reviewing courts.[4]

FEDERAL:

Delgado v. United States, 327 F.2d 641 (9 Cir. 1964)

United States v. Bonhan, 477 F.2d 1137 (3 Cir. 1973)

United States v. Larson, 760 F.2d 852 (1985, CA8 Minn.)

Young v. Guste, 849 F.2d 970 (1988, CA5 La.)

Thompson v. United States, 293 A.2d 275 (D.C. Cir. 1972)

Bentley v. Cox, 508 F.Supp. 870 (1981)

United States v. Green, 652 F.Supp. 1312 (1987)

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4. Counsel for petitioner cannot find cases in agreement or disagreement in the following States: Alaska, Hawaii, Iowa, Kansas, Maine, New Jersey, North Dakota, Rhode Island, South Carolina, West Virginia, and Wisconsin.

In accordance are many State reviewing courts.

ALABAMA:

McCray v. State, 501 So.2d 532 (1986, Ala. App.)

Temple v. State, 366 So.2d 740 (1978, Ala. App.)

ARIZONA:

State v. Harris, 451 P.2d 646 (Court of Appeals of Arizona, 1969)

ARKANSAS:

Embry v. Arkansas, 792 S.W.2d 318 (1990)

Ravellette v. Arkansas, 571 S.W.2d 433 (1978, Sup.Ct. Ark.)

CALIFORNIA:

People v. Antista, 276 P.2d 177 (District Court of Appeal, 1954)

COLORADO:

People v. Stead, 54 P.2d 323 (Colo. Sup. Ct.)

CONNECTICUT:

State v. Alfonso, 490 A.2d 75 (Sup.Ct. 1985)

FLORIDA:

Clark v. Florida, 359 So.2d 458

Gable v. Florida, 324 So.2d 97 (1975, Fla. App.)

Giddens v. State, 443 So.2d 1087 (1984, Fla. App. D2)

Smith v. Florida, 279 So.2d 27 (1973)

GEORGIA:

Nations v. State, 177 Ga.App. 801, 341 S.E.2d 482 (1986)

IDAHO:

State v. Garza, 735 P.2d 1089 (1987, Idaho App.)

INDIANA:

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KENTUCKY:

Franklin v. Commonwealth of Kentucky, 490 S.W.2d 148 (Court of Appeals of Kentucky, 1973)

LOUISIANA:

State v. Harvey, 463 So.2d 706 (1985, La. App. 4 Cir.)

MARYLAND:

Garrison v. Maryland, 321 A.2d 767 (1974, Ct.Appeals)

MASSACHUSETTS:

Commonwealth v. Duffy, 357 N.E.2d 330 (Mass. App. 1976)

MICHIGAN:

People v. Davenport, 39 Mich.App. 252, 197 N.W.2d 251 (1972)

MISSOURI:

State v. Reynolds, 669 S.W.2d 582 (1984, Mo. App.)

NEW HAMPSHIRE:

State v. Fossett, 399 A.2d 966 (1979, NH)

NEW MEXICO:

New Mexico v. Bowers, 87 N.M. 74, 529 P.2d 300 (1974)

NEW YORK:

People v. Harris, 366 N.Y.S.2d 697, 47 A.D.2d 385 (Sup. Ct. 1975)

People v. Taggart, 380 N.Y.S.2d 168, 51 A.D.2d 863 (Sup. Ct. 1976)

NORTH CAROLINA:

State v. McLaurin, 357 S.E.2d 636 (1987, Sup. Ct.)

OHIO:

State v. Haynes, 25 Ohio 2d 264, 267 N.E.2d 787 (1971)

OKLAHOMA:

Reser v. State, 488 P.2d 929 (Crim. Appeals of Okla.)

Roth v. Oklahoma, 532 P.2d 1397 (1975, Okla. Cr.)

PENNSYLVANIA:

Commonwealth v. Hicks, 364 A.2d 505 (Pa. Super.)

Commonwealth v. Luddy, 422 A.2d 601

TEXAS:

Flores v. State, 756 S.W.2d 86 (1988, Tex. App. San Antonio)

Joshua v. State, 696 S.W.2d 451 (1985, Tex. App. Houston 14th Dist.)

Smith v. State, 514 S.W.2d 749 (Tex. Crim.)

Williams v. State, 498 S.W.2d 340 (Tex. Crim.)

UTAH:

State v. Fox, 709 P.2d 316 (Utah 1985)

WYOMING:

Neuroth v. Wyoming, 524 P.2d 590 (1974)

In Delgado v. United States, supra, the Court, in reversing, stated:

> "It is fundamental to our system of criminal law that guilt is individual. Here, that means that there must be sufficient evidence to support a finding, as to each defendant, that he or she had possession of the marijuana. Possession can be joint as well as several, 'constructive' as well as 'actual'. It must also be knowing. But here it is pure speculation as to whether Rodriguez alone, or Delgado alone or both of them had possession. No doubt one of them did; perhaps both did. But proof that does not give a rational basis for resolving the doubts necessarily present in the situation pictured to the jury in this case is not sufficient." 327 F.2d at 641.

Due process would be violated by sustaining defendant's conviction because there is no basis for a rational trier of fact to find defendant had knowledge of the contraband.

This Court should grant certiorari to set the standard for all State and Federal Courts on whether mere co-occupancy of an apartment can justify a conviction.

2.

**Due process was denied when the Appellate Court created evidence that did not exist, and then relies on that evidence.**

The Appellate Court misstated the facts. The court stated:

> "On a counter next to the refrigerator, the police found a roll of plastic bags and some cut pieces of plastic which were similar to those plastic packets containing cocaine found under the refrigerator. Some of the bags had their corners cut off, and Howard explained that these corner pieces are frequently used to package cocaine. Resting on top of the bags were a prescription bottle, a bottle of Superior Mannitol and a portable hand scale. (App. A, pp. 3-4)

It is error to state that the prescription bottle was on top of the baggies. They were just on the same counter. The testimony as to what was found where (Tr. 61, 62, 63, 64, 82) is attached as Appendix D. Further proof of the Appellate Court's misconception of

the facts is the State's Brief in the Appellate Court. The State, in its Statement of Facts, merely asserts that defendant's bottle was on a counter. See Appendix E.

For the Appellate Court to rely on facts that do not exist violates defendant's right to due process. Just as due process is violated when a trial court sentences a defendant based upon an "assumption concerning his criminal record which were materially untrue," Townsend v. Burke, 334 U.S. 736, 92 L.Ed. 1690 (1947), id. at 741, 92 L.Ed. at 1693; United States v. Tucker, 404 U.S. 443, 30 L.Ed.2d 592 (1972), due process must be deemed violated where an Appellate Court sustains a conviction based upon facts that are materially untrue. That is the case here.

Certiorari should be granted on this issue.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

FREDERICK F. COHN
Attorney for Petitioner

# APPENDICES

APPENDIX A

App. 1

SECOND DIVISION
October 16, 1990

NOTICE
The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

No. 1-89-3496

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, | ) | Appeal from the Circuit Court of Cook County. |
| vs. | ) | No. 88 CR 732901 |
| NIGEL GORDON, Defendant-Appellant. | ) | Honorable Marcia B. Orr, Judge Presiding. |

O R D E R

Following a bench trial in the circuit court of Cook County defendant Nigel Gordon was found guilty of possession of a controlled substance (Ill. Rev. Stat. 1985, ch. 56 1/2, par. 1402(B)) and possession of a controlled substance with

intent to deliver. (Ill. Rev. Stat. 1985, ch. 56 1/2, par. 1401(B)(2).) Judgment was entered on the latter conviction, and defendant was sentenced to four years imprisonment. On appeal defendant contends that he was denied due process of law because the evidence was legally insufficient to convict him.

About 8:45 p.m. on December 8, 1987, Evanston Police Officers John Howard and Gregory Tomscyk and Chicago police officers executed a search warrant for a second-floor apartment located at 7621 North Greenview in Chicago, Illinois. Baldwin Phillips and a woman were in the apartment, but defendant was not present. A search of the kitchen revealed a clear plastic bag hidden in some insulation underneath the

refrigerator. In the bag were eight balls of tinfoil, and in each of these balls were individually wrapped clear packets containing white powder. There were 38 packets altogether. Lab results of the powder, entered by stipulation, established that the packets contained a total of 8.8 ounces of cocaine.

On a counter next to the refrigerator, the police found a roll of plastic bags and some cut pieces of plastic which were similar to those plastic packets containing cocaine found under the refrigerator. Some of the bags had their corners cut off, and Howard explained that these corner pieces are frequently used to package cocaine. Resting on top of the bags were a prescription bottle, a

bottle of Superior Mannitol and a portable hand scale. The prescription bottle had defendant's name on it and was dated August 24, 1983. Howard said that Superior Mannitol was commonly used as a cutting agent for cocaine and a scale was frequently used to weigh narcotics.

In the front hallway of the building there was a mailbox with the names "N. Gordon" and "B. Phillps" for the second-floor apartment. Betty Coleman, the agent and manager for the owner of the building, testified that she showed the apartment to defendant, who went by the name Nigel Gordy, and Phillips on June 2, 1987. Defendant and Phillips signed a lease for the apartment, and Coleman observed defendant move into the apartment a few days later. Coleman saw

defendant in the apartment on several occasions, defendant gave her the rent money several times, and defendant's name was often on the money orders used to pay the rent. To the best of her knowledge, defendant was still leasing the apartment on December 8, 1987. There was also testimony that a third person lived in the apartment.

Defendant was never present in the apartment during the search. He was arrested on March 1, 1988, when he surrendered to the Evanston police department. Defendant's bond slip, issued on March 2, 1988, was entered into evidence. Under defendant's signature on the bond slip, was defendant's address listed as 7621 North Greenview, apartment 2 in Chicago.

Defendant did not present any evidence. After closing arguments, defendant was found guilty of both counts. The trial court found that defendant was proven to have control over the premises beyond a reasonable doubt and that an inference of knowledge and possession arose therefrom which was not rebutted by any other evidence.

In defendant's only issue on appeal, he claims that he was denied due process of law because the evidence was legally insufficient to convict him beyond a reasonable doubt. He argues in support of his claim that the controlled substance was hidden from view; he was not present when the substance was found; others lived in the apartment; and there was no evidence as to the last time he

was present in the apartment. Based upon these facts, defendant asserts that the State failed to prove that he knowingly possessed the cocaine.

Initially we address defendant's assertion that since the evidence in this case is totally circumstantial, his guilt must be thoroughly established so as to exclude every other reasonable hypothesis of innocence. (People v. Garrett (1975), 62 Ill. 2d 151, 339 N.E.2d 753.) The Illinois Supreme Court has rejected the reasonable hypothesis of innocence standard of review in People v. Pintos (1989), 133 Ill. 2d 286, 549 N.E.2d 344, and in People v. Eyler (1989), 133 Ill. 2d 173, 549 N.E.2d 268. Instead, the reasonable doubt test as set forth in People v. Collins (1986), 106 Ill. 2d

237, 478 N.E.2d 267, is applied in all criminal cases whether the evidence is direct or circumstantial. (People v. Pintos, 113 Ill. 2d at 291.) The proper standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. People v. Collins, 106 Ill. 2d at 261; People v. Griffin (1990), 194 Ill. App. 3d 286, 550 N.E.2d 1244.

Although defendant cites a number of cases from other state and federal courts, we are not bound to follow these other tribunals. (Corbett v. Devon Bank (1973), 12 Ill. App. 3d 559, 299 N.E.2d 521.) Under Illinois law, in order to

prove possession of a controlled substance, the State must show that defendant knew of a controlled substance's presence and that the substance was in defendant's immediate and exclusive control. (People v. Griffin.) Possession may be established by evidence of actual physical possession or constructive possession. (People v. Gallagher (1990), 193 Ill. App. 3d 566, 550 N.E.2d 255.) Constructive possession is that which exists without personal present dominion over a chattel, but with an intent and capability to maintain control and dominion. (People v. Rentsch (1988), 167 Ill. App. 3d 368, 521 N.E.2d 213.) Mere access by other persons is no defense as defendant's possession may be joint with another. (People v. Romero

(1989), 189 Ill. App. 3d 749, 546 N.E.2d 7.) Where a controlled substance is found on premises under the control of a defendant, an inference of knowledge and possession arises which may be sufficient to sustain a conviction of possession absent other facts and circumstances which leave a reasonable doubt of defendant's guilt. (People v. Nettles (1961), 23 Ill. 2d 306, 178 N.E.2d 361.) Whether defendant had possession and knowledge is a question of fact, and the findings of the trier of fact will not be reversed unless the evidence is so palpably contrary to the finding or so improbable as to create a reasonable doubt of guilt. People v. Romero, 189 Ill. App. 3d at 754.

The evidence herein established that the premises were under defendant's control. The apartment was leased by defendant as a co-tenant. He was seen moving into the apartment after leasing it, and he was periodically seen in the apartment. He often paid the rent and on occasion made the payment in person. Defendant's name was on the mailbox for the apartment. (People v. Valentin (1985), 135 Ill. App. 3d 22, 480 N.E.2d 1351.) A prescription bottle with defendant's name on it was found in the apartment, which is highly probative. (See People v. Birge (1985), 137 Ill. App. 3d 781, 485 N.E.2d 37.) Although the bottle was dated August 24, 1983, we do not find that this fact defeats the significance of the bottle which clearly

carried defendant's name. There was no evidence that defendant lived in or rented the apartment earlier than June, 1987. In addition, defendant listed the same apartment address as his address on his bond slip after arrest. See People v. Marshall (1988), 165 Ill. App. 3d 968, 521 N.E.2d 538; People v. Birge.

Although there was evidence that other persons were also tenants of the apartment and had access to it, the requirement of exclusive control of the premises by defendant does not allow him to defeat prosecution simply by a showing of joint control. (People v. Trask (1988), 167 Ill. App. 3d 694, 521 N.E.2d 1222.) Mere access by others to the area where drugs are found is insufficient to defeat a charge of constructive

possession. People v. Gallagher, 193 Ill. App. 3d at 569. See also People v. Romero, 189 Ill. App. 3d at 755.

Defendant also points out that there was no evidence regarding the last time he was in the apartment, relying upon People v. Wolski (1975), 27 Ill. App. 3d 526, 327 N.E.2d 308. However, Wolski is distinguishable from the case at bar. Wolski testified that although he shared the apartment with his brother, he had not been there for three days before the search. Moreover, there was no corroborating evidence linking Wolski to the marijuana other than the fact that he shared the apartment. There was no such evidence in this case. Here, the evidence showed defendant's possession and knowledge of the cocaine despite

defendant's claim to the contrary. In open view on the counter next to the location where the cocaine was found were bags, a scale, and Mannitol, which we will generally refer to as drug paraphernalia. The bags were similar to those which contained the cocaine. Resting on top of this drug paraphernalia was defendant's prescription bottle. This evidence was sufficient to link defendant to the cocaine under the refrigerator and corroborated the inference of knowledge and possession based upon his control of the premises.

The Wolski court did not reject People v. Nettles, 23 Ill. 2d at 306, as defendant contends. It merely found that there were other facts and circumstances which gave rise to a reasonable doubt of

defendant's guilt as provided in Nettles. (See People v. Hester (1980), 87 Ill. App. 3d 50, 409 N.E.2d 106.) And contrary to defendant's argument, Hester did not adopt Wolski, but rather found that Wolski had other facts and circumstances which were not present in Hester that gave rise to a reasonable doubt of guilt under People v. Nettles. The Hester court expressly held that Wolski did not alter Nettles. (People v. Hester, 87 Ill. App. 3d at 54.) Additionally, the Wolski court found that the lack of corroborating evidence linking defendant to the marijuana, as well as the access by others and Wolski's absence raised a reasonable doubt of guilt and not merely Wolski's absence from the apartment and the open access.

Defendants have been found to be in possession of drugs discovered in abodes in which they lived only part time. (People v. Birge.) The fact that the State in this case did not establish defendant's last presence in the apartment does not raise a reasonable doubt of guilt in view of the ample evidence of defendant's control of the apartment and the corroborating evidence.

Another point raised by defendant is the fact that he was not present when the apartment was searched, but Phillips and a woman were. As already stated mere access by others does not defeat a charge of constructive possession. (People v. Gallagher.) In People v. Birge, 137 Ill. App. 3d at 790-91, defendant was not present in the house at the time the

cannabis was found, and there was conflicting evidence that he may have lived at the address only periodically. However, the evidence showed that the home was defendant's permanent address and that his personal property was found in the house. The appellate court affirmed the conviction, holding that the evidence was sufficient to establish constructive possession. Although defendant herein attempts to distinguish Birge by additional factors cited by the Birge court in support of Birge's conviction that are not present at bar, we note that there was additional evidence, here, to support defendant's conviction as well. The drug paraphernalia was in open view, and

defendant's prescription bottle was with the paraphernalia.

Defendant also argues that the cocaine was hidden in insulation under the refrigerator so that it was not in open view nor in a location likely to be seen. The cocaine and drug paraphernalia were found in the kitchen, a common area of the premises where defendant resided and exerted control. (People v. Valen (1989), 183 Ill. App. 3d 571, 578, 539 N.E.2d 261.) The drug paraphernalia was in open view in the kitchen where defendant could have or should have been aware of its presence and existence and was further support of defendant's knowledge and control. (See People v. Scott (1987), 152 Ill. App. 3d 868, 872, 505 N.E.2d 42.) Moreover, defendant's

prescription bottle was with the plastic bags, scale, and Mannitol, adding more support of his knowledge and control of the cocaine. Although the cocaine was "hidden" in insulation under the refrigerator, the trier of fact could easily have concluded that it was defendant who hid the bag. People v. Trask.

People v. Binns (1975), 27 Ill. App. 3d 978, 327 N.E.2d 369, relied upon by defendant to show lack of knowledge, is also distinguishable. In Binns, envelopes containing marijuana were in open view of defendant but there was no evidence that they had been opened. The court found insufficient proof of knowledge because the envelopes were not defendant's; there was nothing to

indicate she knew those types of envelopes were used to transport drugs, and most importantly her claim of lack of knowledge was corroborated by a witness who testified that he planted the marijuana for revenge. There is no evidence herein that the cocaine was planted nor any explanation regarding defendant's prescription bottle and drug paraphernalia discovered in the kitchen. See People v. Carrasquilla (1988), 167 Ill. App. 3d 1069, 1079, 522 N.E.2d 139.

Defendant asserts that the supreme court in People v. Housby (1981), 84 Ill. 2d 415, 420 N.E.2d 151, overruled any "dicta" in prior Illinois cases that permitted an inference of constructive possession from defendant's mere tenancy

in the apartment. A similar claim was rejected in People v. Romero, 189 Ill. App. 3d at 755. Defendant is apparently challenging the inference of knowledge and possession which may be drawn from defendant's control of the premises which was put forth in People v. Nettles. This inference, which has been applied in numerous cases over the years, can hardly be described as dicta.

Under Housby, the permissive inference that the exclusive and unexplained possession of recently stolen property, standing alone and without corroboration of guilt, was sufficient to convict for burglary was found to be no longer applicable under due process concerns. (People v. Housby, 84 Ill. 2d at 423.) The Illinois Supreme Court did state,

however, that the inference did not infringe upon due process rights if three factors were met. (People v. Housby at 424.) These factors are (1) there must be a rational connection between the inferred fact and the proven fact; (2) the inferred fact more likely than not flows from the proven fact; and (3) the inference is supported by corroborating evidence. (People v. Bormet (1986), 142 Ill. App. 3d 422, 491 N.E.2d 1281; see People v. Housby, 84 Ill. 2d at 424.) The same evidence will apparently satisfy all three prongs. People v. Mallette (1985), 131 Ill. App. 3d 67, 71, 475 N.E.2d 237.

The permissive inference of knowledge and possession of drugs that may be drawn from a defendant's control of the

premises was based upon the nature of the commodity and the manner in which its illegal traffic was conducted. (People v. Nettles.) Defendant argues in his reply brief that the reasoning of Nettles is archaic in 1990, because of the more common use of illegal drugs so that their presence in an apartment is not unique. The full context and meaning of the Nettles discussion was the fact that narcotics were illegal; they are valuable to those who possessed them because of the price they commanded; and they subjected a person to severe criminal consequences. While use of illegal controlled substances may be more widespread today than in 1961, the three facts cited by the Nettles court are still very much alive today.

Assuming, arguendo, that Housby has affected the use of the permissible inference found in Nettles, the three factors applied in Housby are present in the case at bar. The apartment was shown to be under the control of defendant by the evidence. The cocaine was hidden in a common area of the apartment. Similar material used to package the cocaine was in open view near the cocaine's location, as well as a scale and Mannitol. Defendant's prescription bottle was with these items. (See People v. Romero, 189 Ill. App. 3d at 755.) These facts were sufficient to establish a rational connection between defendant's control of the premises and his possession and knowledge of the cocaine. Defendant's

knowledge and possession more likely than not flowed from his control of the premises and the location of the cocaine, drug paraphernalia and prescription bottle. The presence of defendant's prescription bottle among the items on the counter corroborated defendant's guilt. Therefore, the inference of knowledge and possession of the cocaine based on defendant's control of the premises did not deny defendant due process. (People v. Housby, 84 Ill. 2d at 431.) The evidence proved his guilt beyond a reasonable doubt.

The judgment of the circuit court is affirmed. Pursuant to the State's request under People v. Nicholls (1978), 71 Ill. 2d 166, 374 N.E.2d 194, defendant is assessed $50 in costs for this appeal.

Affirmed.

HARTMAN, J., with BILANDIC and SCARIANO, J.J., concurring.

APPENDIX B

App. 27

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS<br>Plaintiff-Appellee, | ) | |
| v. | ) | No. 89-3496 |
| NIGEL GORDON,<br>Defendant-Appellant. | ) | |

O R D E R

IT IS HEREBY ORDERED that Defendant-Appellant's petition for rehearing is denied.

JUSTICE ALLEN HARTMAN

JUSTICE MICHAEL BILANDIC

JUSTICE ANTHONY SCARIANO

DATED: November 8, 1990

APPENDIX C

App. 28

71245

ILLINOIS SUPREME COURT
JULEANNE HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

February 6, 1991

Mr. Frederick F. Cohn
Attorney at Law
205 W. Wacker Dr., S#1515
Chicago, IL 60606

No. 71245 - People State of Illinois, respondent, v. Nigel Gordon, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

Bilandic, J., took no part.

The mandate of this Court will issue to the Appellate Court on February 28, 1991.

Mr. Stoioff:

Q What did you do next?

A At that time I had gone around to the rear of the location. Other officers went up to the front.

Q What was the next thing that happened?

A At that time entry was made by the officers through the front of the apartment. We were later let in. I entered into the apartment.

Q Once inside the apartment, what happened?

A Once inside the apartment, two individuals had been secured. An individual by the name of Phillips and a female individual. Then a search of the apartment was conducted.

Q What if anything was found?

A During the search of the apartment found underneath the ice box hidden in some insulation there was a clear plastic baggie, inside this baggie there were 8 balls of tin foil, inside each one of these tin foil balls there was packets that contained a white powder; as much as 7 packets as I recall there was 1 in each of these tin foil packets, and as little as 3 or 4 in some of the others. There was a total of 38 individually wrapped clear packets.

Mr. Stoioff: May the record reflect that I am showing counsel what I have previously marked as People's One and Two for identification?

Mr. Ross: If the court please the defense will stipulate to the contraband that was recovered.

Mr. Stoioff: Thank you, Counsel. I prefer not to stipulate as to this.

The Court: All right.

Mr. Stoioff:

Q Asking leave to approach and show him what has been marked as People's One and People's Two so he can tell the court what that is?

The Court: Fine.

The Witness: These are the 8 tin foil wrappings inside each there were more than one of these.

Mr. Stoioff:

Q What is contained in People's Two?

A Yes, in People's Two there are 38 separately wrapped clear packets each containing a white powder.

Q So the balls of tin foil in People's One were used to be wrapped

around that which is contained in People's Two?

A Right.

Q They have since been separated?

A Yes. We conducted field testing so we can inventory we opened each one and after you open up tin foil the tin foil kind of rips.

Q Other than that, One and Two are in the same condition as they were when you recovered it substantially in the same condition as when you recovered it?

A Yes.

Q Did you find anything other than what was under the refrigerator?

A Yes, I was present when Detective Tomscyk found some other items in the kitchen.

Q Where were these other items?

A They were atop a kitchen counter in the kitchen.

Mr. Stoioff: Will the record reflect that I'm showing counsel what I have marked as People's Three through Six?

Mr. Ross: Is there anything in here?

Mr. Stoioff: There is baggies and cut baggies.

Actually, Judge, I should indicate People's Five will be People's Group Five, there were items contained therein.

The Court: All right.

Mr. Stoioff:

Q Officer, what I have marked as People's Exhibit Three, Four, Group Five, and Six, do you recognize those?

A Yes.

Q How do you recognize them?

A This is what I also observed atop of the counter after it was pointed out by Detective Tomscyk.

Q What is People's Three?

A People's Three is a prescription bottle, penicillin pills that are prescribed to a person by the name of Nigel Gordon.

Q What is People's Four?

A People's Four is a bottle of Superior Mannitol (phonetic).

Q What is People's Group Five outside and within?

A People's Five is a box of Baggies, inside of which is a roll of baggies and several cut corners of these baggies there are some that are different sizes than the others.

Q How about Six?

A Six is a portable hand scale that you carry around.

Q You said you have been a police officer for 18 years?

(Tr. 61, 62, 63, 64)

* * *

Mr. Ross: I renew my objection to that statement.

Mr. Stoioff: I don't know how that's incriminating.

Mr. Ross: He is still getting in through the back door, Judge.

The Witness: I can quote the statement, it's on the report.

The Court: It's not necessary.

Wait until I make my ruling.

The objection is sustained.

Mr. Ross: Thank you, Judge.

Mr. Stoioff:

Q Okay, was the search ultimately conducted?

A Yes.

Q What if anything was found?

A Cocaine was found in 38 individually wrapped packets at the bottom of the refrigerator and immediately adjacent to the refrigerator was a counter in the kitchen that contained items of packaging material, a scale, a pill vile that had the name of Nigel Gordon on it, a box of baggies and various cut pieces of plastic that were identical to those that were contained in the cocaine.

Mr. Stoioff: Counsel, would you stipulate that

(Tr. 82)

APPENDIX E

App. 38

STATEMENT OF FACTS

Defendant, Nigel Gordon, was charged by indictment with the offenses of possession of a controlled substance with intent to deliver and possession of a controlled substance. (R. C13-C15) Defendant waived his right to a jury trial and was found guilty on both counts by the Honorable Marcia Orr. (R. C16-17, C25) The trial court merged the possession of controlled substance count into the possession of a controlled substance with intent to deliver count and entered judgment on the charge of possession of a controlled substance with intent to deliver. (R. 66) Defendant was sentenced to four years in the Illinois Department of Corrections. (R.

171) Defendant now appeals his conviction.

Detective John Howard of the Evanston Police Department was the first witness to testify, on behalf of the People, at defendant's trial. Detective Howard testified that on December 8, 1987, he, his partner Officer Tomscyk and nine or ten Chicago Police Officers executed a search warrant for the second floor apartment of a building located at 7621 North Greenview, Chicago, Cook County, Illinois. (R. 58) The officers executed the search warrant at approximately 8:45 p.m. (R. 58)

Detective Howard testified that he entered defendant's building through the front door. (R. 59) Detective Howard stated that there was a hallway just

inside of the front door of defendant's building. (R. 59) The hallway contained the mailboxes for the residents of the apartment building. (R. 59-60) The mailbox for the second floor apartment was assigned to N. Gordon. (R. 60) The name on the second floor apartment's mailbox corresponded with the name on the search warrant. (R. 60)

After exiting the hallway area, Detective Howard went to the rear of the second floor apartment. (R. 61) Shortly thereafter, Detective Howard was let in the rear door of the second floor apartment by police officers who previously entered the apartment through the front door. (R. 61)

Once inside of the apartment, Detective Howard observed that a male and

female had already been detained. (R. 61) The male's last name was Phillips. (R. 61) At this point the officers conducted a search of the apartment. (R. 61) A plastic bag containing eight tin foil balls, all of which contained separate packets containing white powder, was found underneath the refrigerator located in the kitchen of the apartment. (R. 61, 76-77) The officers also found several other items on a counter top in the kitchen. (R. 63)

One of these items was a prescription bottle in the name of Nigel Gordon. (R. 64) The bottle was dated August 24, 1983. (R. 74) Another item found on the kitchen counter top was a bottle of Superior Mannitol. (R. 64) Superior Mannitol is commonly used as a cutting

agent for diluting cocaine. (R. 65) A roll of plastic baggies was also found on the kitchen counter top. (R. 64) Some of the baggies had their corners cut off. (R. 64) The cut-off corners of plastic baggies are frequently used to package cocaine. (R. 66) In fact, the white powder found under the refrigerator was packaged in cut off corners of plastic baggies similar to the ones found on the counter top. (R. 66) The last item found on the kitchen counter was a portable hand scale. (R. 64) The type of hand scale that was recovered is frequently used to weigh small amounts of narcotics. (R. 66)

Detective Howard further testified that the above mentioned items and the white powder were inventoried. (R. 69)

Furthermore, Detective Howard stated that defendant was not present during the search of the apartment. (R. 72-75) Defendant was arrested when he surrendered to the Evanston Police Department on March 1, 1987. (R. 72, 75)

The next government witness was Officer Gregory Tomscyk of the Evanston Police Department. (R. 78) Officer Tomscyk testified that he along with other police officers executed a search warrant on December 8, 1987. (R. 79) The search was executed in the second floor apartment of a building located at 7621 North Greenview, Chicago, Cook County, Illinois. (R. 79) Prior to executing the search warrant Officer Tomscyk observed a mailbox, assigned to the second floor apartment, in the

hallway of the building. (R. 79) The mailbox had a name plate which indicated that the mailbox was assigned to N. Gordon and B. Phillips. (R. 83)

After passing through the hallway, Officer Tomscyk went to the front door of the second floor apartment. (R. 80) Officer Tomscyk knocked on the door and announced his office. (R. 80) After forcefully gaining entrance into the apartment, Officer Tomscyk handed Baldvin Phillips a copy of the search warrant. (R. 80) At this point, Officer Tomscyk began searching the apartment. (R. 82)

Officer Tomscyk testified that he found a quantity of cocaine under the refrigerator in the kitchen. (R. 82) Moreover, he found plastic bags identical to those used to package the cocaine that

he found under the refrigerator, a scale and a pill bottle with the name Nigel Gordon on it on a counter next to the refrigerator. (R. 82) Officer Tomscyk never saw defendant in the second floor apartment where the narcotics were recovered. (R. 84-85)

At this point, the People proceeded by stipulation. (R. 85) It was stipulated that if Elizabeth Riceso were called to testify she would qualify as an expert and testify that the white powder, recovered from the second floor apartment of a building located at 7621 North Greenview, tested positive for the controlled substance cocaine in the amount of 8.8 grams. (R. 86) It was also stipulated that the chain of custody was at all times proper, in all of the

People's exhibits. (R. 86) The People then moved to have defendant's bond slip, contained in the court's file, moved into evidence. (R. 87) The court allowed the bond slip to be admitted into evidence. (R. 87)

Defendant's bond slip was issued on March 2, 1988. (R. C7) Defendant signed the bond slip in the name of Nigel Gordon. (R. C7) Furthermore, underneath his signature defendant listed his address as 7621 North Greenview, apartment number 2, Chicago, Illinois. (R. C7)

The last witness to testify, on behalf of the People, at defendant's trial was Betty Coleman. (R. 104) Ms. Coleman testified that she is employed by Gar Properties and has been so employed since

1981. (R. 104) Ms. Coleman is an agent-manager for Gar properties. (R. 105) Gar properties owns the apartment building located at 7621 North Greenview. (R. 105) Ms. Coleman stated that on June 2, 1987, she showed apartment number 2, at the 7621 North Greenview building, to defendant and Balvin Phillips. (R. 106) Moreover, defendant and Phillips signed a lease for this apartment. (R. 106-107) Ms. Coleman identified defendant as the man who entered a lease for apartment number 2 located at 7621 North Greenview. (R. 107) Defendant signed the lease in Ms. Coleman's presence. (R. 108) Moreover, Ms. Coleman observed defendant move into the apartment a few days after he signed the lease. (R. 110) Ms. Coleman saw

defendant in the apartment on several occasion and he was still leasing the apartment on December 8, 1987. (R. 110-112) The rent for defendant's apartment was usually paid the by money order. (R. 112) Defendant's name was often on the money orders. (R. 112) After Ms. Coleman finished testifying, the People rested its case in chief.

After the People rested defendant moved for a directed finding. (R. 122) The trial court denied defendant's motion. (R. 126) Defendant did not present any evidence. (R. 128) After closing arguments the trial court found defendant guilty on both counts. (R. 146) At defendant's sentencing hearing the People presented, in aggravation, evidence of a prior conviction for theft

from a person. (R. C37, C41, 166) In mitigation, the defense presented argument that defendant turned himself in after learning about an outstanding warrant and that he was young when he acquired his first conviction. (R. 169-170) The trial court sentenced defendant to four years in the Illinois Department of Corrections. (R. 171) Defendant now appeals his conviction.